

Legal Resolution of Commercial Bribery by MNEs: Based on Foreign Corrupt Practices Act

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Abstract: With the expansion of multinational enterprises (MNEs) overseas, corruption has become an unavoidable problem. Among the many acts of corruption, commercial bribery is the most rampant and has a strong impact on the world economic order, thus the legal resolution of commercial bribery in the trade of MNEs is crucial. This essay will mainly discuss effective legal regulatory measures for the commercial bribery of MNEs based on the Foreign Corrupt Practices Act, and make suggestions for improving the existing legal system of the issue in China through comparative research methods.

Keywords: Commercial Bribery, Foreign Corrupt Practices Law, Long-arm Statute, International Cooperation.

1. Introduction

In combination with the United Nations Anti-Corruption Convention and Foreign Corrupt Practices Act, commercial bribery by MNEs mainly refers to overseas commercial bribery by multinational corporation entities (including their subsidiaries, branches, etc.) in engaging in international commercial activities. In the process of international economic transactions, it is usually manifested as the behavior that multinational corporations giving money and other benefits directly or indirectly to relevant entities or individuals in the host country that can substantially affect the outcome of the transaction, in order to crowd out competitors and strive for or retain more trading opportunities. Several examples of commercial bribery by MNEs include Vitol Oil's use of bribery to the staff of Petrobras, which is a bribery action that lasted for 15 periods of time in certain public officials in Brazil, Ecuador, and Mexico [1].

The act of commercial bribery by multinational enterprises can do harm in three aspects, which are economic order, global welfare and the development of the enterprise inside.

Firstly, commercial bribery increases the cost of international business activities of multinational companies and inflates the cost of obtaining such contracts or businesses in the market, making the law of value unable to play its full role and easily leading to price distortions. At the same time, some companies would have a dominant position in business activities through commercial bribery, and honest companies that refuse to bribe will become a weak party or even be expelled from the market, which will undermine the integrity culture of multinational companies, and bribery may cause bribery officials to make more illegal demands, which undoubtedly destroy the economic order [4].

Besides, these huge commercial bribery costs, which should have been used by companies for purchasing advanced equipment, improving production technology and service qualities, expanding market share, and enhancing employee welfare, are used to corrupt government officials or other organizations, which become their personal benefits [2]. In this way, it is not conducive to the further improvement of international welfare and human life qualities [3].

Last but not least, the enterprises doing such things in commercial bribery do harm to their insides. For instance, the reputation of a bribery enterprise may be lower because of its illegal actions, and the corporate culture and morale of employees in this enterprise may also be influenced in a passive way.

2. Legal Resolution for Commercial Bribery

In this essay, the legal resolution for commercial bribery is mainly based on the legal resolution of the U.S. for it gives a successful and detailed precedent to figure out some specific situations of this incident. Given that the U.S. has an advanced and thorough action named Foreign Corrupt Practices Act (FCPA), this paper will focus on this domestic resolution in the U.S. and discuss several certain legal resolutions in this act.

2.1 Domestic regulation in the U.S. – Foreign Corrupt Practices Act

According to Foreign Corrupt Practices Act, the main rules that can prevent commercial bribery by MNEs are prior inquiry procedure, long-arm statute, affirmative defenses and legal consequences of this deed. The procedure of prior inquiry could help MNE entities to identify the ‘red flag’ in advance and the latter rules could help the courts to have jurisdiction over specific cases and to give the respondent a proper sentence. In this way, these four rules will be discussed in the following description.

2.1.1. Prior inquiry procedure

According to FCPA 15 U.S.C. § 78dd-2(f)(1), there is a procedure given by the Attorney General, which can provide responses to specific inquiries by domestic concerns. This procedure can arise only after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures. The opinion shall state whether or not a specified prospective action would violate the regulations in 15 U.S.C. § 78dd-2. Additional requests for opinions regarding other specified prospective conduct, which is beyond the scope of conduct specified in previous requests, may also be filed with the Attorney General.

Although some specific presumptions can be rebutted by a preponderance of the evidence, this procedure can provide “red flag” identifications for MNEs, especially for those unable to have an access to specialized counsel. This inquiry procedure that provides opinions of the Attorney General is crucial to prevent commercial bribery by MNEs, for some corporations may realize that their prospective conduct will be taking some risk of offending the law only after they receive the responses. Therefore, they may quit the actions that can be identified as “red flag” conduct, which can help to reduce potential commercial bribery.

2.1.2. Long-arm statute

The rules of jurisdiction in FCPA can be divided into territorial jurisdiction and extraterritorial jurisdiction. According to the legal information institute of Cornell Law School, a long-arm statute is a statute that allows for a court to obtain personal jurisdiction over an out-of-state defendant on the basis of certain acts committed by an out-of-state defendant, provided that the defendant has sufficient connection with the state [5]. This essay tends to believe that it is a usual name for extraterritorial jurisdiction, which includes the jurisdiction of the issuer and the jurisdiction of domestic concern.

According to “A Resource Guide to the U.S. Foreign Corrupt Practices Act”, Territorial jurisdiction means that FCPA can be applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States [6]. This kind of jurisdiction could bring some foreign entities to the court in the United States when they take certain actions in the territory of the U.S. Therefore, it can be seen as a host state jurisdiction in order to protect the commercial circumstance in the United States.

Besides, the jurisdiction of the issuer means that a company is under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act in the resource guide. Therefore, the issuer need not be an American company, and a foreign company with American Depository Receipt that is listed on a U.S. exchange is also an issuer and under the jurisdiction of the United States [6].

Moreover, the jurisdiction of domestic concerns is applied to any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship, other than an issuer, that is organized under the laws of the U.S. or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States. Therefore, the long-arm of the U.S. can be stretched overseas and regulate any entities that have concerns with the U.S, giving this country a strong legal power to deter and control commercial bribery by MNEs. At the same time, the long-arm statute, as a kind of extraterritorial jurisdiction can be seen as a home state and third parties jurisdiction, which can not only demonstrates the responsibility of the U.S. as a strong country, but also gives aid to protect the own legal, politics and economic benefits of this country.

However, the long-arm statute can also be quite limited. According to “Introduction to Long-arm Statutes” by Glenn Cohen, it is a statute giving effect to the Constitutional authority to subject non-resident defendants to the jurisdiction of state courts in certain circumstances, so it can be seen as a political measure in extraterritorial jurisdiction in the United States [7]. For one thing, it can be effective only when certain representatives are in the United States or are in some countries that have legal cooperation with agreements or treaties with the U.S. Only in this circumstance, a specific legal prosecution can be taken into action, so it is not a universal way. For another thing, many countries may do not want the U.S. to interfere with their own legal business, thus it can be merely applied in certain countries and can cause dissatisfaction worldwide.

2.1.3. Affirmative defenses

According to “Federal Courts Law Review”, different from a negative defense, which is a defense demonstrating “defects in the plaintiff’s case”, an affirmative defense is a defense that admits the allegations in the complaint, but seeks to avoid liability [8].

The affirmative defenses are available when there is a “local law” defense or a “reasonable and bona fide business expenditure” defense. According to “A Resource Guide to the U.S. Foreign Corrupt Practices Act. Second Edition”, the first type of defense means that the payment was legal under the written laws or regulations of the foreign nation, while the second type means that the money was spent as part of demonstrating a product or performing a contractual obligation [6].

Specifically, in 15 U.S.C. § 78dd-2(c)(1), the ‘local law’ defense includes the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country. In 15 U.S.C. § 78dd-2(c)(2), the typical examples of ‘reasonable and bona fide business expenditure’ defense are the use of resources was directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof.

The affirmative defenses can help to detect whether certain enterprises action is lawful though they may be looked like a kind of commercial bribery. This rule can help to shape a comprehensive legal system for the United States.

2.1.4. Legal consequences

The consequences of commercial bribery by MNEs in legal may contain criminal penalties, civil penalties, forfeiture and disgorgement and collateral consequences.

The different types of penalties depend on the different level of crimes or offenses in specific cases. The punishment intensity of criminal penalties is larger than that of civil penalties. The main target of both types of penalties is to deter and intimidate those who may commit illegal conducts.

In addition to penalties, the MNEs are required to forfeit the proceeds of their crimes, or disgorge the profits generated from the crimes, according to “A Resource Guide to the U.S. Foreign Corrupt Practices Act”. These punishments mainly aim at returning to the initial position of the perpetrator before the crime, and applying the resources in some reasonable and meaningful way [6].

Besides, some MNEs that violate the FCPA may lead to certain collateral consequences. These consequences mainly include debarment, cross-debarment by multilateral development banks and loss of export privileges [6]. In this way, once a multinational enterprise is sentenced to those

collateral punishments, it can be extremely difficult for them to enter the markets of certain countries, especially the U.S., once again [9].

3. Legislative status quo and possible suggestions to improve the legal resolution system of commercial bribery by MNEs in China

3.1 Legislative status quo in China

3.1.1. In terms of criminal actions – Criminal Law

Now that China's Criminal Law specifically sets up Chapter VIII to provide for the crime of corruption and bribery, the conduct of commercial bribery can also be divided into commercial corruption and commercial bribery, which has distinctiveness in its characteristic of target and subject. However, Criminal Law in China does not provide for an independent crime of commercial bribery, which is unsuitable for the development of economic circumstances nowadays and shows a legislative lag in China. Therefore, commercial bribery is not a legal term in the sense of criminal law.

Primarily, the scope of bribery stipulated in China's criminal law is limited to all kinds of "property" and relative interests, but violators often take bribes for non-property benefits like pursuing a better sales environment in host states, gaining relative policy earlier than it is publicized or seeking for accessible operation sources. Therefore, the provisions of China's criminal law are obviously lagging behind and are out of touch with reality.

Moreover, although China's criminal law adopts a double penalty system, no specific standards are given for the determination of the amounts of fines in both Criminal Law and its amendment, causing a large problem in its practices in reality.

In total, the amendment to China's Criminal Law has increased the punishment for bribery, changing from the former "heavy bribery, light bribery" to "equal emphasis on anti-bribery and anti-bribery".

3.1.2. In terms of offensive actions – Anti Unfair Competition Law

Above all, there are defects such as the concept of commercial bribery is not uniform and comprehensive, there is no provision for bribery and parent company responsibility, and the administrative punishment measures for commercial bribery are insufficient. Nowadays, the description of commercial bribery mainly exists in the academic circle instead of in legislation and in practice.

China has not yet enacted a law specifically regulating the commercial bribery of transnational corporations, except for the relevant provisions in China's criminal law and the Anti-Unfair Competition Law, the legal provisions on commercial bribery are mainly scattered in various departmental regulations, like The Implementation of the provisions of the Regulations of the People's Republic of China on International Maritime Transportation, which was made by the ministry of communications. However, there is a rupture between general law and special law in China's non-criminal legal system, and it mainly exists in the form of normative documents or industry regulations in specific areas, and the level of effectiveness is very weak, which demonstrates Chinese legislation of commercial bribery, especially the legislation of commercial bribery by multinational enterprises is complete not form a legal system. In this way, Anti Unfair Competition Law can have a weak effect to deal with commercial bribery by MNEs.

3.2 Possible suggestions to improve the Chinese legal resolution system of commercial bribery by MNEs

The problem with the Chinese legislative status quo is that there is a vacancy in the legislation of commercial bribery, the legislation in criminal law and Anti Unfair Competition Law is quite limited and disordered, for the regulations in criminal law are not explicit and the Anti Unfair Competition Law has several structures and level confusion in legislation. Therefore, possible suggestions should be set up a separate law on commercial bribery. At the same time, now that China lacks a joint effort

in global to deal with commercial bribery by MNEs, possible international cooperation is also covered to improve the Chinese legal resolution system of commercial bribery by MNEs.

It is worthwhile mentioning that although there may have many resolutions to improve the domestic legal system in China for the conduct of commercial bribery, this paper mainly studies the measures in Foreign Corrupt Practices Act, and hold the opinion that this act could bring several practicing consequences in reality. Therefore, the possible suggestions for domestic improvement in the Chinese legal system are based on the Foreign Corrupt Practice Act.

3.2.1. Set up a separate law on commercial bribery

The thorough way to figure out the question of vacancy in the legislation of commercial bribery in China is to set up a separate law of commercial bribery. This separate law should be a targeted regulation of this action, which should contain regulations of the subject, object, and legal relationship. Besides, to improve the legal effect of this law, two things should take into consideration.

The first one is to make quantification of punishment limit, which can clarify the specific punishment to a certain amount of commercial bribery. Moreover, this should be regulated as an independent section in this law. This section is set up to figure out the problems of the indistinct punishment to certain crimes in Chinese Criminal law and make every punishment of the crimes or offenses explicit in certain cases. In addition, some regulations of forfeiture and disgorgement and collateral consequences in FCPA should also be taken into account in this section. The legislative official may make some adjustments to make these kinds of legal consequences suitable to the legal environment of China. In this way, the legal consequences of this separate law could be more comprehensive and unequivocal, thus not only easy for the court to use this law in certain cases, but also can make enterprises have a clear access to understand the legal consequences of specific actions.

The second one is to adopt jurisdiction as an independent section and emphasize the extraterritorial jurisdiction in this written law, which can be a bridge, leading fantasy legal imaginations to become the legal effect and practice in reality. A possible imagination is that adjusts the 'domestic concern' in Foreign Corrupt Practice Law to Chinese law. Therefore, if a subsidiary or branch has a parent company in China, it can be under the jurisdiction of China. While there is a more native way, considering that China has already listed people who were corrupted in China and hid overseas, this list can be extended to the realm of commercial bribery. Nevertheless, bringing about the list calls for many resources, like building up a data base and collecting certain information, and international cooperation, which may not be practical.

The third thing is to adjust authority inquiry as a legal suggestion in this law. The reason why adopting this procedure from FCPA is that there is a vacancy of legal resources in China, especially for corporations and multinational enterprises. In this case, some enterprises may offend the law just because they do not know or misunderstand the existing regulation. Therefore, the procedure of authority inquiry can provide them access to the related regulation and relative legal sources. In the long turn, this legal suggestion could cut down the chances for companies to do some conduct that disobey or violate the law, which can help to reduce the potential conduct of commercial bribery.

3.2.2. Improve international cooperation

China should actively comply with its international obligations, under the United Nations Convention Against Corruption, apply extradition procedures as appropriate, implement extraditions through the conclusion of bilateral and multilateral agreements or arrangements or enhance the effectiveness of extraditions, and use more flexible means to recover corrupt assets, extradite and repatriate corrupt fugitives, manage to combine its native economic circumstance to the world economic environment with such measures to figure out certain conducts [10]. At the same time, China should also strengthen international judicial cooperation, information sharing and intelligence exchange in the prevention, investigation, prosecution and punishment of commercial bribery crimes, reduce obstacles caused by differences in domestic legislation in various countries, continue to improve and expand the existing APEC anti-corruption law enforcement cooperation network, and form a more powerful deterrent to multinational companies and achieve global co-governance.

4. Drawing conclusions

A legal resolution that includes both domestic improvement, which is based on the adoption of the Foreign Corrupt Practices Law, and international cooperation should be created in order to reduce commercial bribery by MNEs, which influences the economic order of host states, especially in China. To reach the improvement, extraterritorial jurisdiction, inquiry for authoritative opinion in advance and collateral consequences can be adopted and be adjusted to enhance the legal system of commercial bribery by MNEs. With the help of countries and organizations around the world, the international assistance mechanism and the anti-corruption law enforcement cooperation network can be improved and a cleaner global business environment can be created.

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